Supreme Court, U.S.
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No. 06 -

In The

SUPREME COURT OF THE UNITED STATES

Ferry Lie, (Agency No. 95-149-537)
Petitioner,

vs.

Alberto Gonzales, US Attorney General
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

By: Sandra Greene, Esquire
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Attorney For Petitioner
Ferry Lie

QUESTION PRESENTED

The Petitioner is Ferry Lie a native and citizen of Indonesia and an individual who challenged the Respondent's finding, in removal proceedings, that he was subject to removal from the United States and ineligible for protection relief in the form of asylum, withholding of removal or protection under the UN Convention Against Torture. In a decision entered on July 15, 2005, the Board of Immigration Appeals denied the Petitioner's administrative appeal challenging the decision of the immigration judge that denied Petitioner's motions to reopen and reconsider. The Petitioner sought reopening due to the Board's rejection of the Petitioner's original appeal as untimely due to the fact that the Petitioner's prior counsel failed to submit his original appeal in a timely manner. The immigration judge denied the Petitioner's motion to reopen, in part, because he found that the Petitioner did not seek reopening in a timely manner.

The evidence of record showed that the Board failed to render a decision regarding jurisdiction for over a year, notwithstanding the fact that the Respondent notified the Board that the appeal was untimely within several days of its having been filed. Neither the Board, nor Petitioner's former counsel informed the Petitioner that the Board's jurisdiction over the appeal was in question so as to put Petitioner on notice that a to reopen might need to be filed.

The question presented is:

Whether the Court of Appeals properly sustained

the decision of the Board of Immigration Appeals rejecting the Petitioner's appeals of the adverse decision of the immigration judge denying Petitioner's motions to reopen and reconsider his removal proceedings, where the decision of the immigration judge contained serious factual errors, the Board's decision raised serious ethical problems due to the conflict of interest that arose as the result of the Board's untimely determination that it had no jurisdiction over the Petitioner's original appeal and where the Court of Appeals rendered a determination regarding the merits of the Petitioner's underlying asylum claim when the Board never had any jurisdiction to adjudicate the merits of the asylum claim because it asserted that it never had jurisdiction over the Petitioner's original appeal.

PARTIES TO THE PROCEEDINGS

Petitioner is Ferry Lie. Respondent is Alberto Gonzales, the Attorney General of the United States.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Ferry Lie, respectfully petitions for a writ of certiorari to review the decision below judgment of the United States Court Of Appeals for the Third Circuit.

OPINIONS BELOW

The opinions of the Court of Appeals below are unreported.

JURISDICTION

The decision of the Circuit Court on Petitioner's Petition for Rehearing was entered on February 5, 2007. Judgment of the Circuit Court on the original appeal was entered on November 12, 2006. The jurisdiction of this court is invoked pursuant to 28 USC sections 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Immigration and Nationality Act, are found at section 240(c)(5), (6)

STATEMENT OF THE CASE

1. Statutory Background-

The instant proceeding involves an important

question of exceptional importance as it involves several important legal questions, the first of which is whether the Board of Immigration Appeals to ethically obligated to grant an alien's appeal of the denial of his motions to reopen and reconsider where the Board's unjustified delay in adjudicating the appeal resulted in a finding that the alien's motions were untimely. Additionally, the Board's untimely adjudication of its jurisdiction was especially egregious because the Respondent provided notice to the Board within several days of Petitioner's filing of the original appeal that a jurisdictional issue had arisen. Nonetheless, the Board did not render a decision regarding its jurisdiction for over a year after the original appeal was filed. The Board offered no explanation as to why the delay occurred.

Additionally, this appeal raises the issue of whether the Court of Appeals could rightly render a decision regarding the merits of the Petitioner's asylum claim where the Board determined that it had no jurisdiction over the appeal. Moreover, this appeal raises the issue of whether the Court of Appeals could properly determine that the Petitioner failed to present a prima facie claim of eligibility for protection relief where the immigration judge had already adjudicated the merits of the protection claim and the Board did not reject the Petitioner's appeals on the basis that he failed to present a prima facie claim to protection relief.

2. Proceedings Below

Petitioner is a 32 year old native and citizen of Indonesia who entered the United States as a non-

immigrant student scheduled to attend Wichita State University in Wichita, Kansas on or about October 6, 2000. Due to events evolving in Indonesia after his arrival in the United States, the Petitioner sought asylum in the United States and did not attend college in Kansas as planned.

Petitioner is married to Hilda Rosalina, an Indonesian asylee who is awaiting adjustment of her status to that of a lawful permanent resident. Petitioner is also the father of a son, Brennan Alexander Lie, a citizen of the United States. The Petitioner is not subject to removal on the basis of any criminal conduct in the United States.

The Petitioner was placed into removal proceedings, through issuance of form I-862, on or about December 5, 2001, after his application for asylum was denied preliminarily by the asylum office in Newark, New Jersey. Thereafter, the application was referred to the immigration court in Philadelphia, Pennsylvania for further adjudication.

On or about January 6, 2003, the Petitioner appeared at an individual hearing before the immigration court in Philadelphia Pennsylvania to present testimony in support of his application for asylum and other protection relief. At the conclusion of the hearing, the immigration judge denied the Petitioner's application for relief and directed the Petitioner to file his appeal of that decision with the Board of Immigration Appeals on or before February 5, 2003.

The Petitioner reserved his right to appeal and secured new counsel, Steven Converse, Esquire, to file the appeal. The deadline for the filing of the appeal

was February 5, 2003. Due to a miscalculation of the deadline by Attorney Converse, the appeal was not received by the Board until February 10, 2003. The agency objected to the continuation of the Petitioner's appeal, asserting the existence of a jurisdictional defect. Toward that end, the agency submitted a motion to summarily dismiss Petitioner's appeal. The DHS motion was dated February 12, 2003. In the filing, the agency sought to inform the Board that there was a question as to the timeliness of the appeal filed by Attorney Converse.

The Board made no ruling on the jurisdictional issue or the underlying appeal until April 2, 2004, when it dismissed Petitioner's original 2003 appeal as untimely.

The decision issued by the Board of Immigration appeals on April 2, 2004 asserting lack of jurisdiction contained several serious and important typographical errors regarding relevant dates in the Petitioner's removal proceedings. The Board repeatedly referenced 2004 as the relevant year in which events related to the Petitioner's original removal proceedings occurred. Inasmuch as the Petitioner's removal hearing was conducted on January 6, 2003, the Board's assertions were obviously wrong. Further, it is clear from review of the documents contained in the administrative record that the Board's multiple reference to 2004 as the year in which events occurred in Petitioner's removal proceedings was in error.

The transcript of the removal proceedings references 2003 as the date of the removal hearing. The oral decision issued by the immigration court references

2003, the motion for summary affirmance and motion for dismissal submitted to the Board by DHS are dated 2003. Similarly, the immigration court's letter to the Board confirming that it had forwarded the record of proceeding to the Board for consideration in Petitioner's 2003 appeal, was also dated 2003. Also, the BIA appeal filing receipt issued to the parties by the Board is dated February 11, 2003. Additionally, Attorney Converse's shipping receipt from UPS indicates that the appeal was mailed to the BIA on February 6, 2003.

Petitioner was informed by Attorney Converse of the dismissal of the 2003 appeal by way of a letter, dated April 19, 2004. On or about May 9, 2004, the Petitioner secured current Counsel and filed a motion to reopen based on ineffective assistance of prior counsel with the immigration court, and filed a notice to the Disciplinary Board of the Supreme Court of Pennsylvania regarding Attorney Converse's error in calculating the filing deadline for the BIA appeal as per the Board's stated requirements in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

The immigration judge, in a decision dated August 3, 2004, denied the Petitioner's motion to reopen due to Petitioner's alleged untimely filing of the motion with the immigration court and his alleged failure to file a claim with Pennsylvania disciplinary authorities. Specifically, the immigration judge asserted that despite the fact that the Board did not assert lack of jurisdiction over the Petitioner's original appeal until 2004, the Petitioner was obligated to file a Lozada based motion to reopen with the immigration court on or before April 7, 2003. This was the finding of the immigration judge

even though the BIA, not the immigration court, had de facto jurisdiction over the Petitioner's immigration claims and was processing the appeal on April 7, 2003.

In calculating the asserted filing deadlines, the immigration judge made repeated errors in referencing the relevant dates of material events occurring in the Petitioner's original removal hearing. He asserted that those dates occurred in 2004 though the final hearing in removal proceedings was held in January 2003.

The immigration judge also asserted that the Petitioner failed to file a claim regarding Attorney Converse's error with the Disciplinary Board for the Supreme Court of Pennsylvania as required by the Board in *Matter of Lozada* . The Petitioner's motion to reopen clearly indicated that such a claim had, in fact, been filed.

Petitioner then, on August 9, 2004, filed a Motion to reconsider the denial of the motion to reopen with the immigration judge. On or about September 2, 2004, Petitioner filed, with the Board of Immigration Appeals, an appeal of the decision of the immigration judge denying the motion to reopen.

On or about September 24, 2004, the immigration judge denied the Petitioner's motion to reconsider. As the basis for the denial, the immigration judge stated hat the deadline for the filing of any motion to reconsider was February 5, 2003. This was his finding, despite the fact that the motion to reconsider sought reconsideration of a decision entered by the court on August 3, 2004. The immigration judge calculated the deadline for the motion to reconsider as 30 days from the date of his original denial of the Petitioner's asylum application,

January 6, 2003. The date should have been calculated from the date that the motion to reopen was denied, August 3, 2004.

Moreover, the immigration judge asserted that there was no error of law or fact in its August 3, 2004, decision despite the fact that the Petitioner's evidence clearly established the errors of the immigration judge.

While the Petitioner was awaiting a decision on his Lozada based claims, the Respondent DHS continued efforts to remove him from the United States. On or about October 8, 2004, Counsel received notification from the Respondent DHS that the Petitioner was to report for detention and removal from the United States on October 14, 2004 at 10:00am. The notice from the agency was dated September 30, but was not postmarked for mailing until October 4, 2004.

Counsel contacted the Respondent and spoke to Deportation officer Ryan Morris, seeking permission from the agency to permit the Petitioner's stay in the US pending litigation of matters pending in the federal courts and the BIA. Counsel was told that the Respondent would not consider any request to stay the Petitioner's removal from the United States until he was taken into custody on October 14, 2004. Petitioner did report to the agency as instructed, but was not taken into custody.

Counsel contacted the Board of Immigration Appeals to request that a stay of removal be granted pending the adjudication of the Petitioner's pending appeal of the denial of the motion to reopen and was told that the agency would not consider such a request

until the Petitioner was actually in DHS custody, no longer at liberty and his imminent removal was confirmed by the Department of Homeland Security.

Petitioner complied with all of the Respondent's requests that he appear for removal when asked to do so.

The Petitioner sought stays of removal from the US District Court for the Eastern District of Pennsylvania, and requested permission to remain in the United States pending adjudication of his custody based habeas petition. Petitioner was granted two interim stays of removal by the US District Court. The last stay of removal was lifted on December 1, 2004 when the US District Court dismissed Petitioner's custody based habeas action. Petitioner filed an appeal of the adverse decision of the US District Court with the 3rd circuit court. Subsequent to receiving the adverse decision of the Board of Immigration Appeals on May 19, 2005, Petitioner withdrew that appeal as moot.

On May 19, 2005, the Board of Immigration Appeals denied the Petitioner's 2004 appeal regarding the decisions of the immigration judge denying Petitioner's motions to reopen and reconsider. In the 2005 decision, the Board reaffirmed its April 2, 2004 decision finding the Petitioner' original appeal to have been untimely filed. The Board further determined that the Petitioner failed to meet his burden of establishing that he suffered past persecution or had a well founded fear of future persecution regarding his protection based applications for relief. The Board stated that, in the process of adjudicating the Petitioner's appeal of the denial of the Petitioner's motions to reopen and

reconsider, it "...decided the (merits of the Petitioner's asylum claims) case on the preceding basis...".

The Board, in its May 19, 2005 decision acknowledged these typographical errors regarding what it termed "relevant dates" in the April 2, 2004 decision, but described the errors as being "minor".

Reasons For Granting the Petition

Ferry Lie, Petitioner, seeks rehearing of his appeal that was denied by the original panel on or about September 26, 2006. Petitioner sought judicial review of the Board's denial of his administrative appeal of the denial of a motion to reopen. The Petitioner's motion to reopen was filed due to his assertion of ineffective assistance of prior counsel in filing his original administrative appeal out of time, his assertion of legal and factual error by the immigration judge in the adjudication of the motion to reopen and impropriety of the Board in rendering an untimely finding that it lacked jurisdiction to consider the Petitioner's original appeal because it was filed late by former counsel.

Though the Board purported to adjudicate the merits of the Petitioner's protection claims in its adjudication of the appeal of the denial of the motion to reopen, the Board erred as it was only permitted to determine whether the Petitioner presented a prima facie claim to protection relief. Moreover, though the Petitioner attempted to present his legal arguments in support of his protection applications to the Board in his original appeal, his legal brief was rejected and not considered as the Board asserted a lack of jurisdiction

over the original appeal. Thus, the Board's adjudication of the merits of the Petitioner's protection claims, solely on the basis of the adverse findings of the immigration judge, and without any consideration of the Petitioner's arguments in support of his request for protection relief was a denial of the Petitioner's right to due process. Moreover, the Respondent erred in adjudicating the merits of the Petitioner's protection claims when adjudicating the denial of a motion to reopen, because, according to its own legal precedent, it only had jurisdiction to determine whether the Petitioner established a prima facie eligibility for relief under such circumstances.

The original panel of the court considering Petitioner's petition for review determined that the Respondent did not err in adjudicating the merits of the Petitioner's application for protection relief despite the fact that Respondent had no jurisdiction to consider that issue unless or until it actually reopened the Petitioner's removal proceedings. Inasmuch as the removal proceedings were never reopened, the Board's jurisdiction over the protection claims was limited to the question of whether Petitioner presented a prima facie claim for relief. Though Board, necessarily had to find a prima facie case in order to even purport to reach the merits of the protection claims, the original panel adjudicating the Petitioner's appeal made the determination that the Petitioner had not presented a prima facie claim for protection relief. The finding of the original panel was clear and plain error due to the contrary findings of the administrative tribunals below. Moreover, the agency never challenged the Respondent's findings that the Petitioner met the prima

facie threshold, and the original panel was entirely without jurisdiction to disturb that finding.

Thus, the original panel committed plain error in finding that the Petitioner did not present a prima facie claim for protection relief. Further, the original panel failed to adjudicate the propriety of the Board's adjudication of the other issues presented by the Petitioner in the administrative appeal including his claim of ineffective assistance of former counsel, legal and factual error by the immigration judge or his assertion of Board impropriety in its unreasonably late assertion that it lacked jurisdiction to consider the Petitioner's original administrative appeal.

Accordingly, the Petitioner asserts that the original panel erred in affirming the findings of the Respondent as the panel ignored the precedential decisions of the 3rd Circuit in *Abdoulai v. Ashcroft,* 239 F.3d 542 (3rd Cir. 2001) and *Sewak v. INS,* 900 F.2d 667 (3rd Cir. 1990). Specifically, the Petitioner asserts that the original panel failed to properly consider the Respondent's violation of the Petitioner's right to due process in the removal proceedings and Petitioner's assertion that he was denied access to fundamentally fair removal proceedings.

Conclusion

WHEREFORE, for all the aforementioned reasons, Petitioner respectfully asks that his petition for writ of certiorari be GRANTED.

Sincerely,

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Ferry Lie

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-3099

FERRY LIE,
Petitioner
V.
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent

Petition for Review of the Order
Of the Board of Immigration Appeals
(A95-149-537)
Immigration Judge: Donald Vincent Ferlise

Submitted Under Third Circuit
AR 34.1(a)
September 12, 2006

Before: SCIRICA, Chief Judge, SLOVITER, and BARRY, Circuit Judges
(Filed September 14, 2006)

OPINION

SLOVITER, Circuit Judge,

Ferry Lie, a thirty-four year old Indonesian of Chinese descent, has filed a petiton for review of the decision of the Board of Immigration Appeals ("BIA") denying his claims for asylum, withholding of removal, relief under the Convention Against Torture ("CAT"), and voluntary departure. He challenges at length numerous rulings on the steps to the final determination, such as the BIA's dismissal of the appeal as untimely, rejection of his claim that his former counsel was ineffective, and denial of his Motion to Reopen. Although he devotes a substantial portion of his brief to these side issues, we need not reach them because he has shown no prejudice from the other rulings inasmuch as the BIA did reach and decide the merits of his claim. We focus exclusively on that issue.

I.

Lie entered the United States on a student visa in October 2000, but failed to attend Wichita State University as intended. Once he was in the country, he decided that it would be less expensive to attend California State University at Fullerton but only attended classes there for a week. He claims that he was forced to drop out because his father was having financial problems and would not be able to help support him or pay his tuition. The former Immigration and Naturalization Service[1] begun removal proceedings on December 5, 2001. Lie conceded that he was removable, but applied for asylum, withholding of removal, relief under the CAT and, in the alternative, voluntary departure. He claims that, as an ethnic Chinese Christian, he would be subjected to both religious and racial persecution if he returned to Indonesia. The immigration judge ("IJ") denied Lie's applications on January 6, 2003. The IJ found that Lie's fear of persecution was neither objectively nor subjectively reasonable, and that Lie's testimony was "totally incredible". App. At 192.

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[1]On March 1, 2003, the INS ceased to exist as an independent agency within the Department of Justice. The immigration enforcement functions of the INS were transferred to the Bureau of Immigration and Customs Enforcement within the newly created Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, sections 441, 451, 471, 116 Stat. 2135 (2002).

Lie's attorney flied an untimely notice of appeal, and the INS moved to dismiss on that ground. After nearly fourteen months, the BIA held that it lacked jurisdiction to consider the appeal because it was untimely. On May 9, 2004, Lie, represented by new counsel, filed a Motion to Reopen the removal proceedings, claiming ineffective assistance by former counsel. In his motion Lie stated that he "will file a complaint with the disciplinary committee of the Supreme Court of Pennsylvania" against the former counsel as required by Matter of Lozada , 19 I&N Dec. 637 (BIA 1988). App. At 120. On August 3, 2004, the IJ denied the Motion to Reopen, because

(1) the motion was not filed within 90 days of the final administrative decision; (2) Lie failed to state any new facts sufficient to justify reopening his case; and (3)Lie failed to satisfy the procedural requirements for an ineffective assistance of counsel claim, because he had neither filed a disciplinary complaint against counsel nor explained his failure to do so.

On August 9, 2004, Lie filed a Motion to Reconsider the denial of the Motion to Reopen. The IJ denied the motion on September 24, 2004. Lie appealed the denial of the Motion to Reopen to the BIA, and after it dismissed his appeal, he filed this petition for review.[2]

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[2]Lie only appealed the order denying the Motion to Reopen. In fact, the appeal was filed on September 3, 2004 three weeks before the IJ ruled on the Motion to Reconsider.

II

This court has jurisdiction to review a final order of the BIA under 8 USC section 1252(a)(1). When the BIA defers to the findings of the IJ, it may be necessary to review both the decision of the IJ and that of the BIA. Miah v. Ashcroft, 346 F.3d 434, 439 (3d Cir. 2003). There are three principal grounds for denying a motion to reopen: (1) the alien has failed to establish a prima facie case that she is entitled to relief; (2) the alien "has failed to introduce previously unavailable , material evidence that justifies reopening; or (3) the requested relief is discretionary and the movant is not entitled to such relief. Sevoian v. Ashcroft, 290 F.3d 166, 169-70 (3rd Cir. 2002). Motions to reopen are disfavored and are reviewed for an abuse of discretion. Lu v. Ashcroft, 259 F.3d 127, 131 (3rd Cir. 2001). Factual determinations are reviewed for substantial evidence. Sevoian, 290 F.3d at 170.

Although the BIA may not have understood that Lie claimed that his Motion to Reopen was timely, see Filja v. Gonzales, 447 F.3d 241, 256 (3rd Cir. 2006) ("The BIA must at least show that it ha reviewed the record and grasped the movant's claims."), and instead held that his appeal was untimely, which Lie concedes, it nonetheless proceeded to consider the merits of Lie's claim. In that regard, the BIA ruled, " for purposes of completeness," that Lie failed to establish past or a well-founded fear of future persecution.

Lie claims that he suffered and will suffer persecution if returned to Indonesia because he

is ethnically Chinese and a Christian. He testified about three incidents which, he claims constituted persecution. First, when he was ten years old, he was riding his bicycle and was in an accident with a car. The driver of the car blamed Lie for the accident, and called him "a stupid Chinese," and hit and kicked him. App. at 227. Second, while in junior high school, Lie was attacked by muggers. In the third incident, people who were already rioting and looting tried to steal his motorcycle. There is no evidence that ethnicity played any part in the lat two incidents. The IJ found, and the BIA agreed, that these events were nothing more than street crime. The BIA expressly agreed with the finding of the IJ that Lie was the victim of "ordinary crime",not persecution. App. At 4.

We consider whether there is substantial evidence to support the decision of the IJ and the BIA. An alien is eligible for asylum if s/he establishes that s/he has been subjected to past persecution or has a well founded fear of future persecution based on one of the five enumerated grounds. 8 USC section 1101(a)(42)(A). To show a well-founded fear of future persecution, the alien must show both a subjectively genuine and an objectively reasonable fear of persecution. *Chavarria v. Gonzales*, 446 F.3d 508, 520 (3d Cir. 2006). Clearly the IJ and the BIA did not err by concluding that these minor events did not rise to the level of persecution. See, *Lie v. Ashcroft*, 396 F.3d 530, 536 (3rd Cir. 2005) (holding that Chinese Indonesian's "account of two isolated criminal acts, perpetrated by unknown assailants, which resulted only in the theft of some personal property and minor

injury, is not sufficiently severe to be considered persecution").

Lie also asserts the protected ground of religion as a basis for asylum. He does not claim to have suffered religious persecution, but he claims that he is afraid to practice his religion openly. Lie testified, and the State Department Country Reports confirm, that many churches have been bombed by Islamic extremists in the past several years. However, most of the bombing occurred on the island of Sulawasi and the Moluccas, which are 1000 miles form Lie's hometown of Jakarta, on the island of Java. Lie was only able to recall a single incident in which a church was attacked in Jakarta.

IJ's are required to consider the local conditions in the part of the country in which the alien lives. "An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality...if under all the circumstances it would be reasonable to expect the applicant to do so." 8 CFR section 1208.13(b)(2)(ii). Lie would not even need to relocate, because there is little evidence of religious violence on Java. The IJ did not err by concluding that the events on Sulawasi and the Moluccas would not affect Lie, especially because he testified that it takes a week to travel to those islands by boat.

The IJ made an adverse credibility determination, characterizing Lie's testimony about the reason he failed to attend college as "totally incredible". App. At 192. The IJ also expressed doubts about the sincerity of Lie's religious beliefs. There is substantial evidence

to support the IJ's adverse credibility finding. Lie was raised as a Buddhist. When he was twenty five, his parents converted to Christianity. He claims that he converted as well, but unlike his parents, he was never baptized and did not belong to a church in Indonesia. He testified that he intends to be baptized, but that he has been too busy. Given the inconsistencies in his testimony, the IJ had reason to find Lie not credible.

In summary, Lie has not established a prima facie case for asylum. He has presented no credible evidence that he was persecuted in Indonesia. As the government stated in its fine brief, "Lie did not testify regarding a single occurrence of persecution directed at him or at his parents...on account of their religious beliefs."Respondent's Br. at 24. His fear of future persecution is not objectively reasonable. According to the State Department Country Report for 2001, Indonesia " officially promotes racial and ethnic tolerance." App. At 324. While there is a history of racial violence, "[r]acially motivated attacks against Sino-Indonesians have dropped sharply since mid-1998." App. At 325. The Indonesian government officially "embraces" several different religions, even lifting its ban on Jehovah's Witnesses in 2001. App. At 318. Although the government has been unable or unwilling to control some religious violence, most of that violence has occurred far from the urban center of Jakarta. Moreover, Lie has not established that he has a genuine, subjective fear of persecution.

To be entitled to withholding of removal, the applicant must show that his or her life or freedom would be threatened upon return to his or her country

on account of one or the five enumerated grounds, 8 USC section 1231(b)(3)(A), which has been interpreted to mean "more likely than not" that the alien would be persecuted. *See Singh v. Gonzales*, 406 F.3d 191, 196 (3rd Cir. 2005). Because Lie is not eligible for asylum, his claim for withholding must fail. *Wang v. Gonzales*, 405 F.3d 134, 144 (3rd Cir. 2005).

Lie also failed to show that he was entitled to protection under the CAT. He did not allege or testify with regard to any acts of torture and there is therefore no basis to overturn the BIA's decision. It follows that the BIA did not abuse its discretion in affirming the IJ's denial of Lie's Motion to Reopen.

We will therefore deny Lie's petition for review.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-3099

FERRY LIE,
Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,
Respondent

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge , SLOVITER, McKee, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHARGARES, and JORDAN, Circuit Judges

The Petition for rehearing, filed by Petitioner Ferry Lie, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

A95 149 537 A-11

By the Court,
/s/Dolores K. Sloviter
Circuit Judge

Dated: February 5, 2007
LML/cc: SLG, RLH

Received and filed

_____

Marcia M. Waldron,
Clerk

A95 149 537 A-12

US Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A95 149 537- Philadelphia Date: May 19, 2005

In re: FERRY LIE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Sandra Greene, Esquire

ON BEHALF OF DHS:
Ira L. Mazar,
Assistant Chief Counsel

CHARGE:
Notice: Sec 237(a)(1)(C)(I), I&N Act [8 USC section 1227 (a)(1)(C)(I)]-
Nonimmigrant-violated conditions of status

APPLICATION: Reopening

The Respondent has appealed an Immigration Judge's decision dated August 3, 2004, denying his motion to reopen. The Department of Homland

Security (DHS) has filed an pposition to the appeal. The appeal will be dismissed.

By way of background, the respondent is a 33 year old male native and citizen of Indonesia who claimed he had been persecuted in Indonesia on account of his Chinese ethnicity, and his Christian faith. In support of his asylum claim, he testified that an automobile attempted to run his bicycle off the road when he was 10 years old in approximately 1982, and that two ethnic Indonesians assaulted him in 1986 when he declined to give them money. In 1998, the respondent claimed that he was assaulted during the course of an attempted robbery when he was driving his motorcycle in the street during general rioting. In 2002, the respondent married a woman who also is a native of Indonesia and who previously had been granted asylum in the United States.

After the respondent's immigration hearing on January 6, 2003, the Immigration Judge made an adverse credibility determination and denied the respondent's applications for asylum, withholding of removal, relief under the UN Convention Against Torture, and voluntary departure. He noted that the respondent has remained in Indonesia until 2000 despite his alleged fear of persecution, and that the respondent did not attend college in the United States as required under the terms of his nonimmigrant status. The Immigration Judge further determined that the three incidents respondent described as allegedly constituting persecution were instead the product of ordinary crimes committed against the respondent without regard to his ethnicity or religion, and that he

had not established that he had been persecuted on account of a protected ground. (I.J. at 9-10).

We dismissed the appeal as untimely on April 2, 2004, because the Notice of Appeal was received 5 days after the filing deadline. The Immigration Judge's oral decision was rendered on January 6, 2003, and the appeal accordingly was due on or before February 5, 2003. However, the Notice of Appeal submitted by the respondent's former counsel was not received until February 10, 2003.[1] We returned the record to the Immigration Judge because we found we had no jurisdiction to consider the appeal, with instructions to either party that a motion challenging our finding that the appeal was untimely should be filed with the Board, while a motion to challenge any other finding, or to reopen the case, should be filed with the Immigration Judge.

The respondent retained new counsel, who filed a motion to reopen on May 9, 2004, with the Immigration Judge, and the Immigration Judge denied it on August 3, 2004. In his decision denying the motion to reopen, the Immigration Judge made identical typographical errors regarding the relevant year as contained in the Board's order, by stating that his oral decision was rendered on January 6, 2004 (when it was actually issued on January 6, 2003) and

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[1] We observe that our order dated April 2, 2004, contained a typographical error because we referenced the year 2004 instead of 2003, in three instances when we discussed the relevant dates. However, this minor error does not affect our ultimate conclusion that the appeal was untimely.

that the respondent's Notice of Appeal was not received by the Board until February 10, 2004, when in fact the Notice of Appeal was received on February 10, 2003. He found that the motion was untimely because it had been filed more than 90 days after his oral decision had been rendered. In addition, the Immigration Judge held that the respondent has not complied with all the requirements for establishing ineffective assistance of counsel as set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988), because the respondent allegedly had not filed a formal complaint with the bar against his former counsel. On September 3, 2004, the respondent's counsel filed with the Board an appeal of the Immigration Judge's decision to deny the motion to reopen.

On August 9, 2004, the respondent's counsel filed with the Immigration Judge a motion to reconsider his August 3, 2004 decision, and the Immigration Judge denied it on September 24, 2004. He found that the motion to reconsider was untimely because it had been filed more thant 30 days after his oral decision of January 6, 2003. In addition, he found that he had not made any error of law or fact when he denied the motion to reopen. Finally, the Immigration Judge found that the typographical errors in the year made by both himself and the Board represented minor errors. The Respondent did not appeal the Immigration Judge's September 24, 2004 decision to deny his motion to reconsider.

On September 30, 2004, the Department of Homeland Security notified the respondent by letter

that he was ordered to report for removal on October 14, 2004. The respondent's counsel indicates that the respondent was granted two interim stays of removal by the United States District Court for the Eastern District of Pennsylvania, but that the stays were lifted on December 1, 2004. Therefore, it appears that the respondent is presently living in the United States without appropriate authorization.

A party seeking reconsideration requests that the original decision be reexamined in light of additional legal arguments, a change of law, or an argument or aspect of the case that was overlooked. See *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991). A motion to reconsider must state the reasons for reconsideration by specifying the errors of fact or law in the prior Board decision and be supported by any pertinent precedent decisions. 8 CFR section 1003.2(b)(1) (2004). A motion to reconsider based upon a legal argument that could have been raised earlier in the proceedings will be denied. See *Matter of Tiwari*, 20 I&N Dec. 254 (BIA 1991), citing *Matter of Medrano*, 20 I&N Dec. 216(BIA 1990, 1991)

On the other hand, a party seeking to reopen removal proceedings must state the new facts she intends to establish, supported by affidavits or other evidentiary material. 8CFR section 1003.23(b)(3). 1003.5(a)(2); *INS v. Wang*, 450 US 139 (1981); *Matter of Leon-Orosco* and *Rodrigues-Colas*, 19 I&N Dec. 136 (BIA 1983; AG 1984); *Matter of Reyes*, 18 I&N Dec. 249 (BIA 1982). A motion to reopen will not be granted unless it establishes a prima facie case of

statutory and discretionary eligibility for the underlying substantive relief sought. See *INS v. Doherty*, 502 US 314 (1992); *INS v. Abudu*, 485 US 94 (1988); *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

On appeal, the respondent's counsel claims that the respondent has complied with the requirements for establishing ineffective assistance of counsel, and he alleges that the Immigration Judge erred in denying the motions to reopen and reconsider[2] . Counsel request that the proceedings be reopened and remanded for a new hearing. Upon review, we affirm our finding that the respondent's appeal was untimely because it was received 5 days after the deadline, despite the typographical errors regarding the year contained in our order of April 2, 2004. However, for purposes of completeness, we note that, even if credible, the respondent has failed on this record to establish past persecution or a well founded fear of persecution. In this regard, we agree with the Immigration Judge's finding in his January 6, 2003 oral decision that the

[2]In an affidavit attached to the motion to reopen, we observe that the respondent incorrectly alleges that the Immigration Judge denied his application as untimely. In fact, the Immigration Judge did not find that the asylum application was untimely even though the respondent last entered the United States on October 6. 2000, and did not submit his asylum application until October 9, 2001. Furthermore, the Immigration Judge explicitly noted in his decision of September 24, 2004 denying the motion to reconsider that he had deemed the asylum application to be timely filed.

three incidents in Indonesia described by the respondent constituted occurrences of ordinary crime against the respondent, and that the respondent has failed to establish that the incidents were motivated in any manner by his ethnicity or religion. Because we have decided the case on the preceding basis, we do not find it necessary or appropriate to address the remaining issues raised by counsel on appeal.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed

For The Board